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FILED
12/22/2022
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: Julie Cristiani
43B-0907-R-2022
Lambert, Kathryn
1.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

* * * * *

CLAIMANT: Virginia R. Shane

CASE 43B-0907-R-2022
43B 194474-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Claim 43B 194474-00 appeared in the Preliminary Decree with the following remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREEED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 200 MINER'S

INCHES DECREED IN CASE NO. 11616 , PARK COUNTY. 43B 125014-00, 43B 194342-00, 43B 194390-00, 43B 194341-00, 43B 194474-00.

DITCH NAME WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

The decree exceeded issue remark was not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA. Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark. A review of all the claims listed in the decree exceeded issue remark revealed that the five claims identified in the remark are for two different water rights and that there is no overclaiming of either right. The issue remark is erroneous and does not require additional proceedings.

APPLICABLE LAW

“All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section.” Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. Each of the claims identified in the decree exceeded issue remark is based on one of two rights decreed to Fred Peake in Cause No. 11616, *Petrich et al. v. Allen et al.*, Sixth Judicial District, Park County. Each right is for 200 miner’s inches with priority date June 4, 1963. However, one right is decreed for diversion into Carter Ditch and the other is decreed for diversion into Mill Creek Flat Ditch. Claims 43B 125014-00, 43B 194342-00, 43B 194390-00, and 43B 194474-00 are for the Carter Ditch water right. Claim 43B 194341-00 is for the

Mill Creek Flat Ditch water right. The claims were erroneously identified and the flow rates erroneously totaled as for a single right. The total flow rate claimed for each Peake right does not exceed the decreed flow rate for each Peake right. The remark is erroneous and should not have been added to any of the claims listed in the remark. The remark should be removed with no additional proceedings.

2. The other remark provides notice of a change made prior to issuance of the Preliminary Decree and does not raise an unresolved issue which needs to be addressed. This remark should be removed as having served its notice purpose.

CONCLUSION OF LAW

The information contained in the claim files for this claim and the other four claims identified in the decree exceeded issue remark is sufficient to resolve the decree exceeded issue remark without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

Virginia R. Shane
PO Box 33
Pray, MT 59065

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 194474-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: VIRGINIA R SHANE
PO BOX 33
PRAY, MT 59065 0033

Priority Date: JUNE 4, 1963

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 139.20 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 23.80

Source Name: MILL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWSWNE	33	5S	9E	PARK

Period of Diversion: APRIL 15 TO JULY 15

Diversion Means: HEADGATE

Ditch Name: CARTER DITCH

Period of Use: APRIL 15 TO JULY 15

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	1.00		NESWNE	18	5S	9E	PARK
2	4.50		NWSWNE	18	5S	9E	PARK
3	9.60		SWSWNE	18	5S	9E	PARK
4	6.90		SESWNE	18	5S	9E	PARK
5	1.80		SESENW	18	5S	9E	PARK

Total: 23.80

THE PLACE OF USE INCLUDES TRACT 12, PARCEL B OF CERTIFICATE OF SURVEY NO. 834 , PARK COUNTY.

Remarks:

AUTHORIZATION FOR CHANGE ISSUED 07/13/1989 FOR CHANGE IN POINT OF DIVERSION COMPLETED 11/01/1991. FILE REFLECTS RIGHT AS IT EXISTED PRIOR TO JULY 1973. APPROVED CHANGES WILL BE RECORDED AFTER FINAL DECREE SEE 43B 194469-00